UNITED
NATIONS

E

Economic and Social
Council

Distr.
GENERAL

E/CN.4/Sub.2/1999/11
17 June 1999

Original: ENGLISH

COMMISSION ON HUMAN RIGHTS
Sub-Commission on Prevention
of Dicrimination and
Protection of Minorities
Fifty-first session
Item 4 of the provisional agenda

THE REALIZATION OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS

Human rights as the primary objective of international trade, investment and finance policy and practice

Working paper submitted by J. Oloko-Onyango and Deepika Udgama, in accordance with Sub-Commission resolution 1998/12

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GE.99-13739 (E)

Introduction

1. At its fiftieth meeting, the Sub-Commission, in resolution 1998/12, decided "to entrust Mr. J. Oloka-Onyango and Ms. Deepika Udagama with the task of preparing, without financial implications, a working paper on ways and means by which the primacy of human rights norms and standards could be better reflected in, and could better inform, international and regional trade, investment and financial policies, agreements and practices, and how the United Nations human rights bodies and mechanisms could play a central role in this regard". In addition, the Sub-Commission requested the two experts "to include in this paper an analysis of the Multilateral Agreement on Investment (MAI) from a human rights perspective, and to consider ways to ensure that future negotiations on the Agreement or analogous agreements or measures take place within a human rights framework". 1/

2. Negotiations relating to the MAI were formally terminated in December 1998 by the Organization for Economic Cooperation and Development (OECD) 2/ on account of several factors, including the inability of the participants in the discussions to agree on key aspects of the draft text, and also from the opposition to the process mounted by environmental, consumer-protection and labour organizations, among others. 3/ Needless to say, the specific process of negotiation, the draft text itself and the broader questions involved in the process necessitate a comprehensive examination of the issue from a human rights perspective. This is because the world is approaching a new and potentially revolutionary epoch in human history. There is a real threat that it may become an epoch in which the unmitigated promotion of increased international trade, investment and finance at the expense of the observance and protection of fundamental human rights and sustainable human development (SHD) is adopted as a mantra guiding many Governments and development economists as was amply demonstrated in the MAI process. Consequently, the complexities of ensuring a more comprehensive and truly universal regime of human rights observance grow rather than diminish.

3. Although the MAI process within the OECD has come to a halt, there are many reasons why the debate generated by the negotiations continues to be of relevance. First and foremost is the fact that aspects of the draft provisions that were at the core of the MAI were borrowed from earlier contexts, such as the North American Free Trade Agreement (NAFTA) and bilateral treaties (BITs). 4/ In which human rights questions remain

important. 5/ Secondly, the pressure for developing a comprehensive multilateral regime based on investment remains and is likely to increase under the impetus of continuing demands for safeguards against accelerated trade and investment. Finally, the growing influence of global actors like multilateral institutions (MLIs) and transnational corporations (TNCs) on the political economy of trade, investment and finance necessitates heightened scrutiny and oversight of the way in which they operate. 6/ Thus, the relationship between human rights and international trade, investment and finance policy and practice is of paramount importance to the United Nations system, to human rights activists, and to the Sub-Commission. It is particularly important given that the predominant view among economists and policy makers in multilateral institutions is that any hindrances to enhanced global trade and investment are a bad thing for humanity. 7/ However, liberalization in the global regimes of trade, investment and finance does not, ipso facto, lead to more positive impacts on the well-being of humankind in general or to the enhancement of economic development in particular. Nor does such liberalization necessarily lead to the greater protection and observation of human rights. 8/

4. The lesson of unbridled international trade, finance and investment liberalization in the 1990s has been a particularly bitter one for the so-called "Asian tigers". 9/ Although this region of the world experienced phenomenal growth rates, ostensibly spurred on by deregulation and increased foreign investment in the 1970s and 1980s, the last several years have witnessed a significant downturn in economic growth and a slowing in the pace of trade in the region. 10/ Not to mention the very many adverse social and welfare consequences that the depression has had on the population. 11/ In fact, the issue is much more complex. 12/ As the Oxfam Poverty Report points out:

> "Trade has the power to create opportunities and support livelihoods; and it has the power to destroy them. Production for export can generate income, employment, and the foreign exchange which poor countries need for their development. But it can also cause environmental destruction and a loss of livelihoods, or lead to unacceptable levels of exploitation. The human impact of trade depends on how goods are produced, who controls the production and marketing, how the wealth generated is distributed, and the terms upon which

countries trade. The way in which the international trading system is managed has a critical bearing on all of these areas." 13/ International trade is thus "... neither inherently good nor bad" 14/ The "boon" of trade and financial liberalization and deregulation should therefore be approached with caution. 15/ Concomitantly, more attention needs to be paid to the construction of mechanisms that do not allow free rein to the merchants of free trade, the accelerated transfer of finance capital and a field day for investment, regardless of its consequences. 16/

I. AN OVERVIEW OF THE RELATIONSHIP BETWEEN HUMAN RIGHTS AND INTERNATIONAL TRADE, INVESTMENT AND FINANCE POLICY AND PRACTICE

5. The issue under discussion involves both conceptual as well as empirical dimensions, some of which are already under consideration by the Sub-Commission and the Commission on Human Rights. 17/ It also involves both categories of human rights, viz., the civil and political, and the economic, social and cultural. Indeed, the question extends to encompass the right to peace, the right to a healthy environment and, more especially, the right to development. It is not far-fetched to imagine trade disputes becoming the source of armed conflict between States, 18/ while the environmental consequences of unchecked investments have been well documented. 19/ The connection between trade, finance and investment and development is fairly clear.

6. An opportunity is also provided for the international community to reaffirm the integral and interconnected nature of the various categories of human rights re-emphasized in the 1993 Vienna Declaration and Programme of Action. 20/ A critical opportunity is thus presented to consider seriously the gender, racial, class and other discriminatory modes in which the current processes of international trade, investment and finance operate. There is little doubt that those most adversely affected by these processes are women, people of colour, minorities, the poor and other vulnerable communities. 21/ Peasant women in various parts of the "South" are affected by structural adjustment policies (SAPs) which have drastically affected the subsistence economy and led to their migration into export-promotion zones and into the sex trade. 22/ The exploitation of child labour results from persistent poverty, which is worsened by the processes of liberalization that remove basic social protections. 23/ Finally, minorities are generally more adversely affected by liberalization processes because of traditional

discrimination, and on account of long-held prejudices that abound. Marc Brown has pointed out how Gypsies in both Hungary and the Czech Republic have been more adversely affected by labour-downsizing policies. 24/ Unemployment amongst minorities is generally higher than among dominant groups. Given all these factors, it becomes apparent that the development of a comprehensive international regime that considers human rights as an integral component of the conduct of international trade, investment and finance is long overdue. 25/

7. It is important to identify the obligations of global actors such as MLIs and TNCs under international human rights law. 26/ It is also critical to consider the internal mechanisms, policy considerations and operational frameworks by which such organizations are governed. In other words, to what extent do human rights principles guide the process of policy formulation, design and actual implementation within the organizations concerned with the area under investigation? Finally, in this respect, it is important not to forget the interface between the formulation of international trade, investment and finance policy and the disparate operations and practices of TNCs. This dimension of the issue is especially important given that investors, traders and financiers who operate on an international scale are, more often than not, TNCs. 27/

8. A phenomenon that is greatly implicated in the discussion at hand is the issue of globalization. Globalization has been recognized as a development that is taking place at a rapid pace and which has several diverse, even contradictory implications for humankind and the observation and respect for human rights. 28/ In the words of Philip Alston:

> "Leaving aside the developments in science, technology, communications and information processing that have made the world smaller and more interdependent in so many ways, globalization has also come to be closely associated with a variety of trends and policies including an increasing reliance upon the free market, a significant growth in the influence of international financial markets in determining the viability of national policy priorities, a diminution of the role of the state and the size of its budget, the privatization of various functions previously considered to be the exclusive domain of the state, the deregulation of a range of activities designed to facilitate investment

and reward individual initiative, and a corresponding increase in the role and even responsibilities attributed to private actors in the corporate sector and in civil society." 29/

9. The Sub-Commission is taking up the issue of globalization under a separate examination focused primarily on the phenomenon in relation to increasing incidents of racism and xenophobia. 30/ Needless to say, the occurrence of globalization in all its varied manifestations 31/ has tremendous implications for the observation of human rights, and by necessary extension for the future conduct of international trade, investment and finance. 32/

10. From an examination of the international scene today, it may be surmised that we are entering an era of a veritable "clash of globalizations" 33/ This is a situation in which the quest for a more vigorous regime of trade and investment is being countered by calls for more rigourous standards of accountability, transparency and democratic methods of operation from what has become an increasingly "globalized" civil society. 34/ "Both international investors and the electronically networked opposition to the MAI are manifestations of globalization: both compromise the concept of national sovereignty and local control." 35/ This Janus-like quality of the process of globalization means that there are differential benefits and disadvantages for both sides. Given that it is nearly impossible to halt the process of globalization, the critical question then becomes how to arrive at a balance that establishes an appropriate framework which guarantees that human rights standards are not minimized by the phenomenal expansion of international regimes of investment, trade and finance.

II. SOME RELEVANT HUMAN RIGHTS INSTRUMENTS

11. The range of international human rights instruments that are of relevance to the area of international trade, finance and investment policy and practice is extensive. The starting point must be the Charter of the United Nations, Article 1 of which defines the purposes of the organization to include, "... cooperation ... in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion". Article 55 stipulates that the United Nations will promote, inter alia, higher standards of living, full employment, and conditions of economic and social progress and development, as well as "... universal respect for, and observance of, human rights and fundamental

freedoms for all ...". Article 56 commits all Members "to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55". 36/

12. The International Bill of Rights (comprising the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR)), contains several provisions of relevance to this study. In addition, there is the Declaration on the Right to Development, the Charter of Economic Rights and Duties of States, the Convention on the Elimination of All Forms of Discrimination against Women, the International Convention on the Elimination of Racial Discrimination, the Convention on the Rights of the Child, several conventions promulgated by the International Labour Organization (ILO), the declarations of several world conferences (including those held in Rio de Janiero, Vienna, Copenhagen, Cairo, Istanbul and Beijing) and a host of regional instruments. 37/

13. The last paragraph of the preamble to the UDHR stipulates that the instrument was designed as:

> "... a common standard of achievement for all peoples and all nations, to the end that every *individual and every organ of society* ... shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance ..." (emphasis added)

This statement clearly imports the idea that the promotion of human rights is not confined only to governments. 38/ It imposes a duty on everybody (including the family, communities, associations and corporations, to mention a few prominent non-State actors) to promote respect for the rights contained therein and to strive to secure their effective recognition and observance. By implication, this means that actions taken by individuals or institutions that do not promote respect for human rights must be countered. Such obligation also brings MLIs and TNCs into their ambit.

14. Article 1 of the UDHR reiterates the point that all human beings are born free and equal in dignity and rights. The article suggests a number of points, including the fact that rights are not conferred by anybody and that any form of deprivation of human dignity is not acceptable. Indeed, one could argue that the idea of human dignity lies at the foundation of all human

rights principles. 19/ Under article 1 it is incumbent upon individuals, institutions or organizations involved in the formulation of international trade, investment and finance policy to be mindful of the impacts on human dignity that those policies may have. Not to do so places them in contravention of the obligation imposed under this universal standard.

15. The notion of human dignity finds duplication in several of the provisions of the International Covenants on Human Rights. Common article 1 of the ICCPR and the ICESCR proclaims the right of all peoples to self-determination, by which they have the right to "... freely determine their political status and freely pursue their economic, social and cultural development". Paragraph 2 of the same article allows for the free disposal of their natural wealth and resources based upon the principle of mutual benefit and international law. Such disposal is stated to be "without prejudice" to obligations arising out of international economic cooperation, but it is clear that such obligations cannot be used to give a greater benefit to one side than the other. The formulation and implementation of policies in the arena of international trade, investment and finance therefore must not lean in favour of only one group of countries or institutions or organizations, at the expense of another. The UDHR emphasizes that there must be mutuality of benefit - a caution that is particularly relevant to societies within economically weaker countries that are more vulnerable to the dictates of MLIs and other powerful international State and non-State actors.

16. Article 2 of the Universal Declaration invokes the principle of non-discrimination "of any kind" on the basis of "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status". The equality of all peoples is a fundamental principle on which the formulation of any policies of international trade, investment and finance must be constructed. Indeed, numerous other instruments including the Convention on the Elimination of All Forms of Discrimation against Women, the International Convention on the Elimination of All Forms of Racial Discrimination, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families and the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, explicitly invoke the principle of

non-discrimination derived from the UDHR in order to ensure that such categories of people are not treated in a different and manifestly discriminatory manner.

17. Article 29.1 stipulates that "everyone has duties to the community in which alone the free and full development of his personality is possible". The question of duties - as a corollary of human rights - has found expression in numerous other instruments, with the objective of ensuring that tyranny is avoided and that a holistic view of a society which recognizes its responsibilities is maintained. 8/ Finally, with respect to the UDHR, article 30, the last article in this instrument, declares: "Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein".

18. Each of the Covenants in the International Bill of Rights has several provisions that are of relevance to the issue under consideration. In the ICESCR we can cite both the processual provisions such as article 1 (on equality) and article 5 (destroying or limiting the rights in the instrument) and those on substantive rights, including article 6 (right to work), Article 7 (just and favourable conditions of work), article 8 (trade union rights) and articles 9 (social security), 11 (adequate living standards), 12 (health), 13 (education), and 15 (culture). The formulation of policy on international trade, finance and investment must ensure not only that it meets the processual requirements outlined in the Covenant, but that it also does not offend the substantive provisions thereof.

19. The ICCPR also has a number of provisions that come into play in this discussion. Among them are article 6 (the right to life), article 19.2 (freedom of expression), article 22 (freedom of association) and article 25 (partaking in public affairs). There is no doubt that the adoption of wrong policies on trade, investment and finance at the international level has implications for the right to life. Furthermore, the creation of exclusive zones of economic activity (so-called "exclusive protection zones") in which trade union activity is often prohibited or severely proscribed affects the rights to free association, expression and assembly, to mention a few. 9/ Article 25 articulates the right to participate in the political affairs of the State. Although its concern is primarily with the relationship between the individual and the State, 10/ the "right to participate" (particularly

with respect to matters concerning development) has over time been expanded to encompass the obligations of non-State entities like MLIs and development agencies. 43/ Indeed, in many respects inattention to the right to participate is the cause of flawed and discriminatory policies that have adverse human rights consequences.

20. A particularly important instrument for the discussion of the area of international trade, finance and investment policy and human rights is the Declaration on the Right to Development. 44/ This instrument is especially useful in that it adopts an approach that looks at both categories of human rights, as well as at the situation of both the individual and the State. 45/ Article 3 of the Declaration describes the primary responsibility of States for the creation of national and international conditions favourable to the realisation of the right to development, while paragraph 3 of the same article imposes a duty of cooperation in ensuring development and in eliminating the obstacles to development. If development is viewed as a process of expanding the human rights and freedoms that people enjoy, then the formulation and implementation of policies governing international trade, investment and finance must not lead to their contraction.

21. Article 4 also imposes a duty on States individually and collectively to "... formulate international development policies with a view to facilitating the full realization of the right to development". At a minimum, even those institutions that do not profess to be engaged directly in the promotion or protection of human rights, do profess adherence to the right to development. 46/ Viewed critically, the right to development is the amalgamation of all human rights, even if there is some disputation over the Declaration's practical importance and effective application. 47/ Although the Declaration only refers to States, institutions involved in the formulation of international trade, investment and finance policy must pay due attention to the instrument. In the same way, the 1974 Charter of Economic Rights and Duties of States provides a broad framework for consideration of the basic obligations that both States and non-State actors have under the international system. 48/ Article 2.2 (b) clearly states that, "Each State has the right ... to regulate and supervise the activities of transnational corporations within its national jurisdiction ... Every State should ... cooperate with other States in the exercise of [this] right." 49/

22. Under the aegis of the United Nations Development Programme (UNDP), the notion of Sustainable Human Development (SHD) has gained in prominence in the debate about development. 50/ Through its annual Human Development Report (and initially through its Index on Human Freedoms), the UNDP has sought to promote a more holistic view of human progress which does not focus primarily on the economic dimensions of growth. Its 1998 publication, which attempts to integrate the discussion on SHD with human rights, is the first attempt by an intergovernmental agency to seriously address the issue. Any formulation of international policy on finance, trade and investment must seriously consider the implications for SHD.

23. The status of labour rights is significantly implicated in any discussion of policy and practice relating to international trade, investment and finance. The ILO in its conventions and recommendations has formulated the basic standards governing the area. Among the most important are conventions ensuring freedom of association, ensuring the right to form trade unions and to negotiate terms and conditions of employment, protecting children and women, prohibiting forced labour and protecting the environment. 51/ These conventions provide binding principles and standards for the protection of labour and need to be observed seriously in the formulation of policy with regard to international trade, investment and finance.

24. Aside from the ILO conventions, a number of international organizations - the OECD, UNCTAD and the World Bank among them - have all variously addressed the issue of labour standards. 52/ The critical issue is the extent to which a human rights approach is adopted by these organizations towards the matter, and the extent to which the standards articulated conform to those adopted by the ILO.

25. The 1990s have been a period in which a number of important world conferences have been held, commencing with the United Nations Conference on Environment and Development, held in Rio de Janeiro in 1992; the World Conference on Human Rights held in Vienna in 1993; the World Summit for Social Development held in Copenhagen and the Fourth World Conference on Women held in Beijing in 1995; and the United Nations Conference on Human Settlements (Habitat II) held in Istanbul in 1996. The declarations emanating from those conferences have particular relevance to the issue presently under discussion because they represent broadly articulated international consensuses on the

place of human rights within international relations and the obligations of States towards ordinary people. Furthermore, being conferences organized under the auspices of the United Nations, the implications for States, United Nations agencies, MLIs and TNCs are significant. The breadth of the issues covered by the conferences is also quite wide. A broad review of each of the declarations demonstrates that MLIs and TNCs are in many instances both the subjects and the objects of the issues covered therein. In the formulation of international trade, investment and finance policy, MLIs (and TNCs) would do well to ensure that those provisions of the declarations that have implications for their operations are duly considered.

26. Each of the major regional blocs of the world, with the exception of Asia, has a human rights instrument that articulates principles and standards of application that are of relevance to the human rights dimensions of international trade, investment and finance. Specific reference can be made to the European context - the regional bloc within which the OECD is situated - where the debate on the MAI was conducted. A Social Charter accompanies the primary instrument in the region (the European Convention on Human Rights). The latter has a number of provisions that should be taken into account when the members of organizations like the OECD or the European Union attempt to formulate policies on international trade, investment and finance. The same applies to the Americas where a greater percentage of the investors who are the subject of analysis are resident. Despite the absence of a similar regime in the Asian context, organizations such as the Asia Pacific Economic Cooperation (APEC) and the Association of South East Asian Nations (ASEAN) would do well to recall the human rights obligations imposed by international law. 53/ Finally, the African Charter on Human and Peoples' Rights has several provisions that address the issue of development and human rights, including articles 21 (free disposal of wealth), 22 (development) and 24 (environment).

III. CRITICAL MULTILATERAL AND REGIONAL INSTITUTIONS

27. The institutions besides TNCs of most critical concern to the area can be divided into two broad categories, viz., those concerned with the formulation of policy on international and regional trade, and those which have a brief that covers international investment and finance. In the area of international trade, mention must be made of the World Trade Organization (WTO), the United Nations Conference on Trade and Development (UNCTAD), and

even the World Intellectual Property Organization (WIPO) 54/ and the United Nations Commission on International Trade Law (UNCITRAL). Other intergovernmental agencies are invariably concerned with the issue, including the ILO and UNDP, the latter particularly because of the SHD dimensions involved. 55/ Several regional and bilateral contexts for trade, investment and finance including, inter alia, NAFTA, 56/ APEC, 57/ ASEAN, 58/ the EU, 59/ the Common Market of Eastern and Southern African States (COMESA) and the Economic Community of West African States (ECOWAS), are also relevant. 60/

28. It is important to recall that more non-State actors (including TNCs) are beginning to recognize the importance of human rights principles to the work that they do. 61/ This explains why, to mention one example, notions drawn from the field of human rights recently appear to have gained some favour amongst official aid agencies, albeit, as yet, still only indirectly. The attention currently being paid to concepts such as "good governance", "participatory development", "promoting democracy", and "strengthening civil society", is indicative of this general trend. 62/ The human rights responsibilities of MLIs and TNCs do not arise simply because they are critical actors in the development and execution of policies but because (particularly with respect to the former) they are also collectives of States. Secondly, as we approach the close of the millennium, MLIs have become more prominent in the linkage of the concepts of human rights, development and poverty, although a gulf still remains in several different respects. Indeed, as Roger Riddell observes of the view from the "field", "... there is little evidence to suggest that in practice this perspective is driving their aid and linked interventions". 63/

29. With regard to the area of international finance and investment, the main organizations of concern are the Bretton Woods organizations, comprising the International Monetary Fund (IMF) and the World Bank. 64/ Although these institutions have come some way from outright rejection (characteristic of their position in the 1960s and 1970s) of the applicability of human rights standards to their operations, they still adopt a rather ambivalent approach to the notion of human rights. 65/ Thus, they selectively apply certain aspects and leave out others. 66/ In a paper on democracy and development, the General Counsel of the World Bank, Ibrahim Shihata, presents the classic

justification for why the Bank should not be pushed too far in the concern for issues that may be considered outside its mandate, among which human rights are regularly included:

> "There is the need to honour the charter of each organization and to respect the specialization of different international organizations as reflected in the statutory requirements of their respective charters. Such is the case, in particular, with the charters of specialized UN agencies, such as the World Bank, which delimit the mandate of each organization." 67/

30. "Honoring the charter" of the World Bank is thus placed above any international obligations which the Bank may have by virtue of membership in the United Nations family. Such an approach could imply that any action permitted by the Bank's charter may appropriately be pursued regardless of the adverse human rights or other consequences that may result or the fact that it may offend the Charter of the United Nations or the Universal Declaration of Human Rights.

31. Under the presidency of James Wolfensohn, the Bank has sought to distance itself somewhat from the supply-side economic policies favoured in the 1980s and early 1990s. 68/ More attention is being paid to social safety nets, enhancing the ability of countries to provide basic education and health care, and the notion of "good governance". In 1998, the Bank published a report entitled, Development and Human Rights, 69/ in which it for the first time lays out the Bank's position on the kinds of human rights it is supposed to foster, the relationship between governance and development, equality and development and the protection of vulnerable groups. This is a welcome development and its translation into concrete action is awaited, particularly in light of the operations of the IMF.

32. The role of the IMF has even more serious implications for the observance and protection of human rights in the area of international financial policy, especially since it has imposed provisions in its loan agreements ("conditionality") and bailout packages that are very similar to those found in the MAI. The IMF's role has been critical in the application of structural adjustment programmes (SAPs) which, according to the independent expert of the Commission on Human Rights, on the effect of SAPs on the full enjoyment of human rights, have two distinct (and generally adverse) impacts at the economic and political levels. 70/

33. Ironically, the Articles of Association of the IMF do not have a bar similar to that invoked by the World Bank whenever the issue of human rights is pursued in a direction found uncomfortable. 71/ Paradoxically, the Fund is even more adamant that its operations have nothing to do with human rights, and its methods of work amply demonstrate this. 72/ Some observers have nevertheless pointed to a "changed stance" on the part of the IMF which, under pressure from organizations like UNICEF and some States, has begun to discuss the distributional aspects of its policies with a view to the protection of the well-being of vulnerable groups. 73/ Nevertheless, even those who have observed such changes come to the conclusion that the "hard core" of IMF programmes has remained largely intact, with a "... focus on measures that tighten domestic credit, enhance fiscal revenues, reduce government expenditures, and adjust the exchange rate" 74/ The principal problem with the "honouring the charter" or "privileging the Articles" approach to the issue is that it subordinates the international human rights instruments to the charters of the agencies in question when, as a matter of law, the reverse should be the case. Human rights obligations emanate from the Charter of the United Nations and the Universal Declaration, and have come to represent a standard that in over 50 years of existence signifies a holistic approach to the human condition.

34. Concerning the area of international trade policy formulation, much of the attention in the aftermath of the MAI debacle has shifted to WTO. Many observers view WTO as the most logical area in which to conduct future debate on a multilateral investment arrangement, although a growing lobby against such a proposal is already coalescing. 75/ Responding to this challenge, the WTO's Working Group on the Relationship between Trade and Investment recently produced an extensive report outlining the major issues of concern, and also touching on some of the controversies raised by the MAI. 76/ The Working Group has determined that there is no right to invest under customary international law, and that investors' rights are essentially the result of international treaties. 77/ The Working Group has also addressed the standard of National Treatment.

35. Significant questions nevertheless remain as to the appropriateness of WTO as a negotiating forum on account of the inequality of bargaining strengths between members and the automatically binding character of all WTO treaties once ratified, accompanied by the drastic measures imposed for

non-compliance. 78/ WTO also suffers from one of the major problems that afflicted the MAI process in the OECD - the absence of a framework for incorporating civil society and other third-party participation in its deliberations. Finally, although the Working Group stipulated that any discussions on investment agreements in WTO should consider the "development impact", this by no means confirms that the perspective adopted will be a rights-sensitive one. 79/ It is instructive to note that the report makes no reference to the Declaration on the Right to Development, let alone to any other human rights instrument. Furthermore, none of the human rights treaty bodies nor the Office of the High Commissioner for Human Rights (OHCHR) appears to have made any contribution to the deliberations.

36. It is apparent that multilateral institutions like the Bank, the IMF and WTO need to be continuously reminded of the human rights obligations established by international law. 80/ To borrow from Asbjørn Eide, these comprise the obligations to "respect", "protect" and "fulfil". 81/ But more importantly, MLIs must also respect and apply those standards to their own internal processes of policy formulation, or else those obligations cease to be of any import. This raises major issues of accountability, 82/ transparency and inclusion - issues that came to the fore in vivid and dramatic fashion in the negotiations over the MAI.

IV. THE MAI PROCESS AND SUBSTANCE: A BROAD RESUME

37. Given the eventual outcome of the MAI, it is unnecessary to provide a blow-by-blow examination of the Agreement originally envisaged in the Sub-Commission resolution. 83/ Instead, we focus here on the broad human rights issues raised by the processual and specific substantive dimensions of the MAI up to the point at which the negotiations were terminated. The discussion of the substantive provisions is with respect to the MAI negotiating text as it stood on 14 February 1998, 84/ in addition to an OECD Commentary of 24 April 1998. 85/

38. It is fairly clear that issues of process were as important (if not more so) in the MAI negotiations than those of substance, which explains its characterization by one observer as "multilateralism from above". 86/ The process that accompanied the negotiations raised numerous human rights issues. 87/ One could even say that the whole thrust of the process was grounded in an ideological conception that was antithetical to all the well-known tenets of human rights law. Among them we could speak broadly

about issues of transparency, accountability, participation and good governance. The process further raised questions concerning the liability and responsibility of multilateral actors (such as the OECD) for human rights observance and the protection and overall respect for the instruments. This is an issue of continual concern in relation to TNCs, and can also be applied to WTO, the IMF and the Bank. 88/ Such processual questions cut to the core of the right to participate - traditionally confined to the right to participate in government, 89/ but which must, given the phenomenal increase in the power and scope of operations of MLIs, be extended to cover them too. 90/ In the final analysis, these are processual questions that relate to the phenomenon we can best describe as "global governance". 91/ Put another way: What are the human rights duties and obligations of institutions that formulate policies that have a global impact, such as the OECD, the Fund or WTO?

39. As the principal agency behind the MAI, it is necessary to consider the role and function of the OECD. A grouping of 29 countries established in September 1961, it comprises the world's richest States, although a few middle-income States are also included. Its basic functions are to promote policies designed to:

(a) Achieve the highest sustainable economic growth and employment and a rising standard of living in Member countries, while maintaining financial stability, and thus to contribute to the development of the world economy;

(b) Contribute to sound economic expansion in member as well as non-member countries in the process of economic development; and

(c) Contribute to the expansion of world trade on a multilateral, non-discriminatory basis in accordance with international obligations.

40. In pursuance of the above objectives, the OECD has developed many different processes intended to streamline its interventions, among which several have implications for human rights. In this regard the Development Assistance Committee (DAC) of the OECD is most relevant. In 1995, the DAC published guidelines entitled Participatory Development and Good Governance. Chapter IV of these guidelines is devoted to the issue of human rights. Paragraph 66 stipulates as follows:

"DAC members reiterate their adherence to the internationally defi[illegible] principles and standards contained in the UN Charter, the International Bill of Human Rights and other instruments, notably the

various UN Conventions which target particular human rights abuses such as slavery and torture, discrimination against women, or the protection of population groups such as children, refugees and migrants and the Conventions of the International Labour Organization concerning trade union rights. The 1993 Vienna Declaration on human rights reaffirms the universality and indivisibility of all human rights and fundamental freedoms, in accordance with the United Nations Charter. It also affirms the responsibility and duty of States to promote and protect human rights and fundamental freedoms. Human rights are at the same time a legitimate concern of the international community. Enhancement of international cooperation in the field of human rights is essential for the achievement of the purposes of the UN." 92/

41. Reading the above stipulation one would applaud the OECD for producing the most forthright statement of any multilateral agency on the extent of its obligations under the various human rights instruments. How then could the OECD have engaged in a negotiating process over the MAI that almost wholly negated the above stipulations, and indeed was thoroughly violative of a host of basic human rights principles?

42. The history of negotiations over the MAI date back to at least 1995, and have been described as having commenced and been conducted in an atmosphere of "intense secrecy", 93/ although this charge has been denied by the organization. Whatever the case, the February 1997 leaking of a draft of the negotiating text to a Canadian NGO spurred intense NGO activity against the MAI. The response of human rights groups (it must be noted) was somewhat belated - the labour, environmental and consumer-protection organizations having agitated against the treaty almost from the start. 94/ Nevertheless, as debate over the process intensified, human rights issues came to the fore. The failure of the OECD to respond adequately to charges that the process was not transparent and exclusive may not simply be a problem of public relations. It may also have been the outcome of continuous insulation of the institution from pressures of the kind presented by NGOs in their onslaught against the treaty, and of neglect by the OECD of the scope of application of basic international human rights principles as they apply to its operations. 95/

43. A number of additional points emerge from the processual dimensions of the debate over the MAI. The first is the forum in which the negotiating process took place, which requires us to revisit the manifestations of the

schemes and structures of multilateralism as they operated at the time. Although organizations like the OECD operate on a global scale, their membership, procedures and guiding philosophies do not actually present an image that can be described as either truly global or genuinely multilateral, except in the sense that they are not bilateral: both developing countries and non-governmental actors were excluded from the negotiating process. Second, the process had commenced with a lopsided focus, viz., the transfer of rules and principles from contexts and situations like NAFTA and the BITs (where the imbalance between the parties is not necessarily a serious factor) to a multilateral context in which, at least prima facie, there is equality of status. Finally, when placed against the backdrop of all the OECD's previous postures vis-à-vis respect for human rights and concern for social policy - from the DAC guidelines to the guidelines on MNEs - it smacked very much of double standards: do as I say, but not as I do. In other words, the concepts of inclusion, non-discrimination and equality that the OECD urges for others do not apply to the OECD itself. This has been a running critique of both multilateral institutions like the World Bank and the IMF, and of Governments which espouse doctrines like free trade but enforce the dictum in only one direction.

44. Concerning substantive matters, the MAI can be criticized both on the basis of the general and the specific. Regarding the former, the MAI sought to boost significantly the rights of investors without introducing any countervailing obligations. In short, its vision conceptually privileged the "rights of investors" while negating investors' responsibilities to the individual or the State. Secondly, the treaty proposed to place fairly extensive restrictions on domestic activity with regard to investment, which would amount to the imposition of serious limitations on the sovereign ability of States to respond to domestic concerns, including those in the areas of labour, the environment and human rights. In this way, States faced the danger of being transformed into the handmaidens of investment as opposed to protectors of the people - their primary human rights obligation - and in the process forced to contravene or to relegate to a secondary position the obligations contained in a host of international human rights agreements. Lastly, the dispute resolution and expropriation provisions respectively

raised concerns about the lack of transparency and the imposition of unjustifiable restrictions on host countries' freedom of action in the interests of development. 96/

45. The human rights issues raised by the MAI relate to four broad areas of the Agreement: the clause on National Treatment; Performance Requirements; the Dispute Resolution mechanism; and the provision on Expropriation. The clause on National Treatment would require States to grant foreign investors no less favourable treatment than they accord their own investors, thereby prohibiting State protection and promotion of local enterprises or economic sectors. 97/ Such measures could lead to a downgrading of the protections afforded to labour as countries would compete to provide more attractive foreign investment incentives in a "race to the bottom". The MAI prohibits the introduction of "performance requirements" such as the transfer of technology and the setting of levels of use of local raw materials, human resource development and employment conditions. 98/ The provision omits any reference to subjecting investors to any of the current or future environmental, human rights, labour and other regulations that countries may wish to implement. 99/

46. In relation to the envisaged dispute resolution mechanism in the MAI, investors are permitted to bring a cause of action against Governments and to seek monetary compensation in the event that a governmental policy is deemed to violate investors' rights as established in the Agreement. However, there is no reciprocal affirmative right for States to take investors before an international tribunal. 100/ Moreover, the MAI did not provide a mechanism for "screening" claims which could have a dampening effect on a Government's desire to implement or maintain domestic regulatory laws concerning, inter alia, human rights, protecting indigenous peoples, enforcing the right to a healthy environment and protecting labour rights. Finally, the Expropriation provision in the MAI was overly broad, failing to provide adequate definitional boundaries to protect reasonable State action in the public interest, and virtually prohibiting a contacting State from introducing measures to improve its regulatory framework which may affect investors' operations. 101/

47. To conclude, the MAI as it stood at the termination of negotiations in December 1998 ignored several dimensions of a State's affirmative obligations to respect, promote and protect human rights. Investment cannot be promoted

at the expense of the healthy growth of the human being, or of sustainable human development. Economic growth and liberalization should not occur at the expense of governmental power to protect all persons within its territory. Human rights are often best guaranteed by strengthening governmental power to protect resources and the human rights of all persons resident within the territory of a State. Additionally, it could be said to amount to a violation by the respective member States of the OECD of the obligations to respect, protect and fulfil international human rights standards. The processual aspects through which the draft treaty was conceived, elaborated and eventually debated confirm the worst for those fearing a globalized world in which the benefits of development are localized in the hands of a powerful coterie of economic actors, excluding the vast majority of humankind. In form and in substance, the MAI represented the ultimate negation of all the basic principles of fundamental international human rights.

V. CONCLUSIONS AND RECOMMENDATIONS

48. Several conclusions and recommendations emerge from the above discussion. It is quite clear that the question of integrating human rights concerns into the discussion on trade, investment and finance policy is a difficult issue and requires more comprehensive examination. Such a process must commence with the critical involvement of the two entities of the United Nations system concerned with the matter. This must include those bodies familiarizing themselves with the issues on both sides of the conceptual divide. It is especially essential for the treaty bodies to begin to address themselves to those aspects of the issue that relate to their respective mandates, i.e. the impact of multilateral policies on trade, investment and finance on women, children, minorities, indigenous peoples and vulnerable communities of various kinds. In short, we are calling for the establishment of mechanisms by which to carry out appropriate human rights impact assessments of the effects of the implementation of policy decisions made in multilateral and intergovernmental organizations. 102/

49. Secondly, there is a need for the processes by which policy on international trade, investment and finance is discussed to be opened up, first and foremost, to all States that make up the family of nations; it must also be made fully accessible to non-State actors. MLIs and intergovernmental agencies, including the OECD, WTO, the IMF and the World Bank, need to more critically address the issue of the "right to participation" in formulating

policy in the area of international trade, investment and finance. Indeed, the suggestion that such organizations need themselves to be guided by a code of conduct for their operations should be seriously considered. 103/ This obviously raises the additional question of both the necessity for a multilateral arrangement on investment, and the appropriate forum in which negotiations over the issue should take place. These are intricate questions that require deeper study and further consultation.

50. Thirdly, The Sub-Commission must remain seized of this matter and proceed to a more in-depth study that in the first instance reviews the more specific aspects of the relationship between trade, investment and finance policy and practice and human rights. It must elaborate a guiding framework in which a more rights-sensitive approach to the issue can be adopted, taking into account the several dimensions discussed in this study. In other words, the Sub-Commission should outline in greater detail the basic human rights principles on which an alternative multilateral regime governing international trade, investment and finance should operate.

51. Fourthly, steps must be taken to advance the processes of improving and implementing the OECD guidelines on MNEs, and reviving and discussing the enforcement of the United Nations Code of Conduct for Transnational Corporations. Such measures must ensure that there is an appropriate balance between the objective of facilitating enhanced investment and establishing a solid human rights-based framework for the operation of TNCs. 104/

52. Fifthly, all the treaty bodies and other institutions concerned with human rights must intensify their respective scrutiny of the processes taking place in the various multilateral institutions and the intergovernmental organizations that are involved in the matter.

53. Finally, in view of the complex and wide-ranging scope of the issues raised in the relationship between trade, investment and finance policy and practice and the observation and protection of human rights, it would seem appropriate that a preliminary but substantial report be submitted to the Sub-Commission at its fifty-second session in 2000. After the Sub-Commission has discussed the preliminary report, a progress report can be prepared for the next session, in the light of comments and recommendations received.

Notes

1/ This working paper has benefited from the work of students attached to the Human Rights Program at Harvard Law School, Cambridge, Massachusetts, United States of America. See, Harvard Human Rights Program, "The Multilateral Agreement on Investment: Advocacy History and Prospects for the Future", (May 1999) (hereinafter referred to as "HRP Paper"). The authors particularly thank Peter Rosenblum, Laurie Sickmen and Angela Wu. David Weissbrodt of the University of Minnesota Law School, Marci Hoffmann of the School of Law at Georgetown University and Tuaka Awori of Associates for Change (AFC) in Kampala, Uganda, are thanked for their support in accessing materials crucial for the research.

2/ The OECD is a multilateral institution established in 1961 and presently made up of 29 members with a secretariat in Paris. See "About OECD", at http://www.oecd.org/about/general/index.html, accessed on 7 May 1999.

3/ The accounts of why the process halted are varied. See, inter alia, Stephen Kobrin, "The MAI and the Clash of Globalizations", Foreign Policy, 97-109 (Fall 1998); James Davis and Cheryl Bishop, "The MAI: Multilateralism from above", 40 Race and Class, 159 (1998/99).

4/ For a good discussion of the origin and contemporary status of BITs, see, Christopher N. Camponovo (Comment), "Dispute Settlement and the OECD Multilateral Agreement on Investment", UCLA Journal of International Law and Foreign Affairs, 181, 190-194 (1996), and Kenneth J. Vandevelde, "The Political Economy of a Bilateral Investment Treaty", 92 American Journal of International Law, 621 (1998).

5/ Initial designs were to negotiate an international investment treaty in the WTO. Treaties like NAFTA already incorporate aspects similar to those that raised contention in the MAI process. See, Magda Shahim, "Multilateral Investment and Competition Rules in the WTO: An Assessment", 6 Transnational Corporations, 171 (1997), and Helene Bank and Yash Tandon, "Multilateral Agreement on Investment (MAI): A Shift in OECD Strategy", 7 Southern & Eastern African Trade, Information and Negotiations Initiative (SEATINI) Bulletin, 3 (15 October 1998).

6/ MLIs have not received much attention in the debate about designing human rights frameworks to govern their operations but TNCs have - from both the United Nations with its Code of Conduct and from the OECD.

7/ See, Marc W. Brown, "The Effect of Free Trade, Privatization and Democracy on the Human Rights Conditions for Minorities in Eastern Europe: A Case Study of the Gypsies in the Czech Republic and Hungary", 4 Buffalo Human Rights Review, 275, 279 (1998) (discussing the link between free trade and human rights, and its impact on the so-called "Gypsies" (Romany people) of the two countries). But also see Communication from the Republic of Korea to the WTO Working Group on the Relationship between Trade and Investment dated 30 March 1999, document No. WT/WGTI/W/69, arguing that Korea places its hopes for recovery on a "substantially liberalized FDI regime" as well as liberalization measures in the context of IMF adjustment programmes.

8/ Dirk Messner, "Towards a New Bretton Woods: Globalization and the Challenges Facing Politics", Development and Cooperation, 4 (1999).

9/ See, Martin Khor, "The Economic Crisis in East Asia: Causes, Effects, Lessons", El Taller: International Conference and General Assembly on the New Millennium: Globalization and its Challenges, Tunis, 12-16 November 1998, and Robert Wade, "The Asian Crisis and the Global Economy: Causes, Consequences and Cure", 97 Current History, 361-373 (November 1998).

10/ World Trade Organization, "World Trade Growth Slower in 1998 After Unusually Strong Growth in 1997", (Press Release of 16 April 1999 on WTO Webpage at: http://www.wto.org/wto/intltrad/intrtrad.htm). But the "tigers" were not the first to experience the effects of ill-conceived liberalization efforts. The "Southern Cone" countries of Argentina, Chile and Uruguay were affected in similar fashion in the late 1970s, with Mexico following suit in the 1980s. See, Stephan Haggard and Sylvia Maxfield, "The Political Economy of Financial Internationalization in the Developing World", 50 International Org., 35-68 (1996).

11/ See, Voravidh Charoenloet, Labour Standards in Thailand: The Impact of Trade Liberalization Programme for the Study of International Organizations (PSIO), Occasional Paper No. 2, Social Aspects of Trade Liberalization Series, 7-8 (1997), and UNCTAD, Trade and Development Report, 72 (1998) (detailing the social consequences of the Asian crisis).

12/ The World Bank makes some interesting observations on the Asian crisis although it tends to cast all the blame onto the failure by the affected Governments to establish appropriate mechanisms without making any mention of the contribution of the policies of the Bank or the IMF to the crisis. See, International Bank for Reconstruction and Development/World Bank, Development and Human Rights: The Role of the World Bank, 17-18 (1998).

13/ Kevin Watkins, The Oxfam Poverty Report, 109-110 (1995).

14/ Ibid.

15/ UNCTAD, op.cit., note 11 76.

16/ See, Robert Wade and Frank Veneroso, "The Gathering Support for Capital Controls", 41 Challenge, 14-26 (1998).

17/ See, for example, Sub-Commission resolution 1998/14 and José Bengoa, "The relationship between the enjoyment of human rights, in particular economic, social and cultural rights, and income distribution", (E/CN.4/Sub.2/1998/8).

18/ See the interesting discussion by Roger Riddell on the link between development (or the lack thereof) and conflict. Roger Riddell, Minorities, Minority Rights and Development: An Issues Paper, Minority Rights Group, 28-31 (November 1998).

19/ See, for example, Lawyers Committee for Human Rights and Institute for Policy Research and Advocacy (ELSAM), In the Name of Development: Human Rights and the World Bank in Indonesia (1995).

20/ Paragraph I.5, Vienna Declaration and Programme of Action, (A/CONF.157/24 (Part I)), Chapter III.

21/ See, generally, Charoenloet, supra., note 12, 20-22, and 25-27 (on child labour and the situation of migrant workers), Michele Sforza, "Globalization, the Multilateral Agreement on Investment, and the Increasing Economic Marginalization of Women", Preamble Centre (at http://www.preamble.org/MAI/womfin.html), and Riddell, op.cit., note 19.

22/ See, for example, Nimalka Fernando, "Women and Globalisation" in Globalization and Discrimination, 95 (International Movement Against All Forms of Discrimination and Racism (IMADR), eds., 1998), and Sforza, ibid., 4-5.

23/ Charoenloet, op.cit., note 11, at 20-22.

24/ See, Marc Brown, op.cit., note 7, at 294-295 and 299-312.

25/ Attempts have been made but their impact has not been widespread. For examples, see, inter alia, Human Rights Council of Australia, The Rights Way to Development, and James Paul, "Incorporating Human Rights into the Work of the World Summit for Social Development", Issue Papers on World Conferences, No. 3 (American Society of International Law, Washington DC, February 1995).

26/ Because the issue of TNCs and their obligations under human rights law is under consideration in various other Sub-Commission studies, our focus here is mainly on MLIs.

27/ See, Amnesty International and Pax Christi (Dutch Sections), Multinational Enterprises and Human Rights (1998).

28/ Committee on Economic, Social and Cultural Rights, "Globalization and economic, social and cultural rights", statement made on 11 May 1998.

29/ Philip Alston, "The Universal Declaration in an Era of Globalization", in Reflections on the Universal Declaration of Human Rights: A Fiftieth Anniversary Anthology, (Barend van der Heijden and Bahia Tahzib-Lie, eds.), 29 (1998).

30/ See Sub-Commission decision 1998/104.

31/ There are a host of differing views on what the term "globalization" actually means. Unfortunately, as Professor Anthony Giddens of the London School of Economics has pointed out, the majority emphasize only its economic manifestations. See, Anthony Giddens, "Runaway World", the 1999 British Broadcasting Corporation (BBC) Reith Lectures, located at: http://news.bbc.co.uk (accessed on 11 April 1999). Also see, UNDP, Human Development Report, 6 (1998). There is nevertheless general agreement that the global economy has changed dramatically over the last decade, with wide-ranging and fundamental impacts on human society.

32/ Committee on Economic, Social and Cultural Rights, op.cit., note 29, para. 3.

33/ See Kobrin, op.cit., note 3.

34/ As Kobrin somewhat ruefully notes: "The days of negotiating international treaties behind closed doors are numbered, if not over. A much broader range of groups will have to be included in the globalization debate, and much more thought will have to be given to how non-participants will interpret international negotiations and agreements", Ibid., 99.

35/ Ibid.

36/ See further, Ian Brownlie, Principles of Public International Law, 573-575 (1998).

37/ These would include instruments such as the European Convention on Human Rights and the Social Charter, the InterAmerican Convention on Human Rights and the African Charter on Human and Peoples' Rights. See also the African Charter for Popular Participation in Development and Transformation (United Nations document E/ECA/CM/16/11 (1990)).

38/ See also Pierre Sané, "The New Challenges of Inequality", Label France, 25 (1998).

39/ Danilo Türk, "Development and Human Rights", in Human Rights: An Agenda for the Next Century (Louis Henkin and John L. Hargrove, eds.), 167, 168 (1994).

40/ For good discussions of the issue of duties in international human rights law, see, International Council on Human Rights Policy, Taking Duties Seriously: Individual Duties in International Human Rights Law (1999), and Makau wa Mutua, "The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties", 35 Virginia Journal of International Law, 339 (1995).

41/ See Friends World Committee for Consultation (Quakers), "Sharing Responsibility for Labour Standards and Trade Liberalisation", 31-35 (Report of a seminar and workshop, 3-8 October 1997). See also, John Eremu, "Uganda Warned on EPZ Strategy", New Vision, 7 December 1998, 54 (pointing out that EPZs in many African countries are characterized by long working hours, compulsory night shifts, job insecurity, poor pay, and child labour).

42/ See, Henry J. Steiner, "Political Participation as a Human Right", Harvard Human Rights Yearbook, 77 (1988).

43/ See, Celia R. Taylor, "The Right of Participation in Development Projects", 13 Dickenson Journal of International Law, 69 (1994).

44/ General Assembly resolution 41/128 of 4 December 1986.

45/ See, Preamble and articles 1, 2 and 6.

46/ Indeed, following the Vienna Declaration and Programme of Action, "... the right to development gained a stronger status". See, Danilo Türk, "The Right to Development", Interights Bulletin, 43 (1998/99).

47/ See, Riddell, op. cit., note 18, p. 6.

48/ General Assembly resolution 3281 (XXIX), of 12 December 1974.

49/ Ibid., article 2.2 (b).

50/ J. Oloka-Onyango, "Beyond the Rhetoric: Reinvigorating the Struggle for Economic and Social Rights in Africa", 26 California Western International Law Review, 29-34.

51/ See, Sumner M. Rosen, "Protecting Labour Rights in Market Economies", 14 Human Rights Quarterly, 372-373 (1992).

52/ See, for example, OECD, Trade, Employment and Labour Standards: A Study of Core Workers' Rights and International Trade (1996).

53/ An interesting document has recently emerged from a coalition of human rights NGOs in the Asian region. The degree to which it will feature in ongoing efforts by Asian countries to arrive at a regional human rights instrument is unknown. See, Our Common Humanity, Asian Human Rights Charter (1999).

54/ The issue of intellectual property rights (IPR) is fundamental to so many of the tensions involved in contemporary debates about globalization, trade/investment and human rights, although the extent to which WIPO has directly addressed human rights questions (as opposed to those related to development) is questionable. See, Ruth L. Gana, "Has Creativity Died in the Third World? Some Implications of the Internationalization of Intellectual Property", 24 Denver Journal of International Law and Policy, 109-144 (1995), and Stefania Ercolani, "The OECD Multilateral Agreement on Investment (MAI) Project: The Possible Consequences of Including Intellectual Property", 9 Ent. L. Rev., 125 (1998).

55/ UNDP has recently taken some steps in an attempt to marry the concept of SHD to that of human rights. See, UNDP, Integrating Human Rights with Sustainable Human Development (1998).

56/ Currently there is a process of negotiation in the Americas to create a free market system within the framework of the Free Trade of the Americas Agreement (FTAA), which has a tentative deadline of 2005. Several of its investment provisions differ in significant ways from the MAI.

57/ M. Sonarajah, "Protection of Foreign Investment in the Asia-Pacific Economic Co-operation Region", 29 Journal of World Trade, 105, 123-125 (1995).

58/ See, Charoenloet, op. cit., note 11, 26-27.

59/ See, Thomas W. Waelde, "International Investment Under the 1994 Energy Charter Treaty", 29 Journal of World Trade 5 (1995), and Michael D. Sandler, "Report on the Multilateral Agreement on Investment to the American Bar Association (ABA)", 31 International Law, 205 (1997).

60/ Other regional agencies that are relevant to this issue are the regional development banks - the Asian Development Bank, the African Development Bank, the Inter-American Development Bank and the European Bank for Reconstruction and Development. Of the four, only the last (created in 1990) departs from the World Bank position on human rights, with an explicit provision that compels the Bank to take human rights principles into account in its transactions. The charter of the EBRD conditions assistance on, inter alia, a country's commitment to and application of "the principles of multiparty democracy, pluralism and market economics". See art. 1, Agreement Establishing the European Bank for Reconstruction and Development (29 May 1990).

61/ See, David Weissbrodt, "Transnational Corporations and Human Rights", paper given at the fiftieth session of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, 3 August 1998, and Amnesty International and Pax Christi, op. cit., note 27, 45-54.

62/ P. Osodo and S. Matsvai, Partners or Contractors: The Relationship Between Official Agencies and NGOs: Kenya and Zimbabwe (1998).

63/ See Riddell, op. cit., note 18, p. 35.

64/ A sister Bretton Woods organization of relevance is the International Centre for the Settlement of Investment Disputes, which is important on account of its experience as a forum for Government-investor litigation - an issue that was central to the concern over the MAI provisions.

65/ For a good background to the place of human rights in the World Bank, see, Lawyers Committee and ELSAM, op. cit., note 19, 13-33.

66/ The closest the World Bank has come to a human rights approach to its activities is through the issue of "good governance" which in the 1990s has led the Bank to become involved in certain aspects of civil and political rights. Problems still remain with this and other aspects of the Bank's position on human rights. See, Lawyers Committee for Human Rights, The World Bank: Governance and Human Rights: An Update, 35-38 (1995).

67/ Ibrahim Shihata, "Democracy and Development", 46 International and Comparative Law Quarterly, 635, 638 (1997).

68/ Op. cit., note 8.

69/ See, World Bank, op. cit., note 12.

70/ See, Report of the open-ended working group on structural adjustment programmes and economic, social and cultural rights, on its second session, 1-3 March 1999 (E/CN.4/1999/51), para. 11 (a), 3.

71/ Graham Bird, "The IMF and Developing Countries: A Review of the Evidence and Policy Options", International Organizations, 477-511 (1996).

72/ See, Balakrishnan Rajagopal, "Crossing the Rubicon: Synthesizing the Soft International Law of the IMF and Human Rights", 11 Boston International Law Journal 81, 93 (1993).

73/ Ibid.

74/ Ibid., 493.

75/ See, "Call to Reject Any Proposal for Moving the MAI or an Investment Agreement to the WTO", (Joint NGO Statement at http://www.citizen.org/pctrade/mai/html, accessed on 18 December 1998), and Bhagirath Lal Das, "Risks in Investment Negotiations", 7 Seatini Bulletin, 7-8 (15 October 1998).

76/ WTO, Report of the Working Group on the Relationship between Trade and Investment to the General Council, 8 December 1998 (WT/WGTI/2; 98-4920, accessed at: http://www.wto.org, on 20 May 1999.

77/ Ibid., 35.

78/ See, generally, Eric M. Burt (Note and Comment), "Developing Countries and the Framework for Negotiations on Foreign Direct Investment in the World Trade Organization", 12 American University Journal of International Law and Policy 1015 (1997) (examining the essential elements of the MAI and considering the appropriateness of the WTO as a negotiating forum for an agreement).

79/ As the Committee on Economic, Social and Cultural Rights has pointed out, "Many activities undertaken in the name of 'development' have subsequently been recognized as ill-conceived and even counter-productive in human rights terms". General Comment No. 2, para. 7 (1990).

80/ See, para. 19, Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (1997).

81/ See, Asbjørn Eide, Right to Adequate Food as a Human Right, (United Nations publication Sales No. E.89.XIV.2).

82/ See, remarks by Daniel D. Bradlow on "The Accountability of International Organizations to Non-State Actors", 92 American Society of International Law Proceedings, 359 (1998).

83/ The most comprehensive analysis that we came across was that done by the group Public Citizen. See, Public Citizen (Global Trade Watch), "MAI Provisions and Proposals: An Analysis of the April 1998 Text", accessed at http://www.citizen.org/pctrade/MAI on 16 September 1998.

84/ Accessed at http://www.oecd.org/daf/cmis/mai/maitext.pdf on 6 December 1998.

85/ OECD, The Multilateral Agreement on Investment: Commentary to the MAI Negotiating Text (as of 24 April 1998).

86/ See, Davis and Bishop, op. cit., note 3.

87/ See, Milloon Kothari and Tara Krause, "Human Rights or Corporate Rights? The MAI Challenge", 5 Tribune des Droits Humains, 16 (April 1998).

88/ See, Amnesty International and Pax Christi, op. cit., note 27.

89/ See, Steiner, op. cit., note 42.

90/ As Jonathan Cahn points out, the World Bank is "... virtually immune from any form of accountability to those developing country citizens for whom the Bank plays its governance role. Bank decision-making is embedded in processes that make no accommodation for public participation and shielded from public scrutiny by Bank secrecy". Jonathan Cahn, "Challenging the New Imperial Authority: The World Bank and the Democratization of Development". 6 Harvard Human Rights Journal, 159, 160-161 (1993).

91/ See, Harlan Cleveland, Birth of a New World (1993).

92/ Development Assistance Committee (DAC) of the Organization of Economic Cooperation & Development (OECD), Participatory Development and Good Governance, para. 66, 23 (1995).

93/ HRP, op. cit., note 1, 2.

94/ See, Kothari and Krause, op. cit. note 87.

95/ See, International NGO Committee on Human Rights in Trade and Investment, Investment, Trade and Finance: The Human Rights Framework (Focusing on the MAI), 1 August 1998.

96/ See, HRP, op. cit., note 1.

97/ See, article III, para.1, clause 1; Negotiating Text, op. cit., note 85.

98/ See, generally, article III, para.8, clause 1, sub-clauses (b), (f), (j) and (k), ibid.

99/ HRP, op. cit., note 1, pp. 11-12.

100/ See, article V, Negotiating Text, op. cit., note 85.

101/ Ibid, article IV, para. 2.

102/ The notion of human rights Impact Assessments (HRIAs) as necessary elements in the design of policies is gaining acceptance in diverse forums. See, for example, para. 20, Communiqué of the Meeting of Commonwealth Law Ministers (7 May 1999), and the Declaration and Programme of Action (Vienna

Plus Five Review: Recommendation 4 of the Working Group on the Effectiveness of the UN System and NGO Access to the United Nations), in 5 Human Rights Tribune, 8 (1998).

103/ As one scholar has pointed out, it is essential that policy programmes that are the foundation of operational activities in international organizations be "... legitimized by democratic decision-making procedures". See, Volker Rittberger, "Democracy and International Organization", paper presented at the second meeting of the United Nations University Advisory Team on Peace and Global Governance, 9 (24-25 October 1994).

104/ See, Scott Leckie, "Another Step Towards Indivisibility: Identifying the Key Features of Violations of Economic, Social and Cultural Rights", 20 Human Rights Quarterly 81, 114 (1998).